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REMARKS

I. Status of Claims

Claims 22-32 are pending in this application. No claim has been amended by this response.

Applicants wish to thank the Examiner for withdrawing the objection over claims 27, 28, 30, 38, 39, and 41 and the rejection of claims 33-42 under Section 102(b) over International Publication No. WO 97/00288.

II. Rejections Under 35 U.S.C. § 103(a)

In order to carry the initial burden of establishing a *prima facie* case of obviousness, the Examiner must show (1) that there exists some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the references or to combine reference teachings, (2) that there is a reasonable expectation of success, and (3) that all claim elements are disclosed by the prior art references. See M.P.E.P. § 2143. For the reasons set forth below, Applicants submit that the Examiner has failed to meet this burden.

A. “Admitted prior art” in view of WO ‘288

The Examiner has maintained the rejection of Claims 22-31 under 35 U.S.C. §103(a) over the “admitted prior art” in view of WO ‘288 for the reasons disclosed on pages 3-5 of the Final Office Action. Applicants respectfully traverse this rejection for at least the reasons set forth below.

As previously argued, the Examiner maintains with a vague reference to “admitted prior art” that the prior art teaches an electric cable for transporting electric

energy comprising at least one conductor and at least one insulating layer or at least one covering made of a crosslinked polymer material or elastomer. *Office Action*, page

2. The Examiner admits, however, that this prior art does not teach an insulating layer comprising the presently claimed elastomer composition; thus, the Examiner relies on the teachings of WO '288 to provide this teaching. *Id.* Because WO '288 allegedly teaches that this elastomer composition has certain improved mechanical properties, the Examiner reasons that it would have been obvious to use this composition as the insulating layer in the composition allegedly taught by the prior art. *Id.* Applicants continue to disagree with this alleged motivation to combine these teachings.

1. The Examiner's Rationale is Driven by Hindsight; A Person of Ordinary Skill in The Art Would Not Have Been Motivated

As mentioned above, in order to make out a prima facie case of obviousness, the Examiner must establish, among other criteria, that the cited references would have suggested, to one of ordinary skill in the art, the desirability of the claimed invention. M.P.E.P. § 2143.01. Applicants submit, however, that the Examiner has not proven this particular requirement. Instead, the Examiner has relied heavily on the fact that each element of the claims is known. Armed with that fact, the Examiner summarily dismisses Applicants' arguments of record and makes no specific factual findings as to why one of ordinary skill in the art would have combined the references in such a way as to produce the claimed invention.

In the previous response, Applicants contended that if Exxon Corporation believed its elastomer composition was suitable for an electric cable it would have explicitly stated this, as it had done in WO 97/00523. WO 97/00523 disclosed similar ethylene, α -olefin, vinyl norbornene elastomers as WO '288, was filed the same day by

the same Applicant. In her response, the Examiner appears to have misunderstood Applicants' arguments of record. Final Office Action at 4-5. Applicants did not try to argue that "the elastomer composition of WO '288 is not suitable for the electrical cable product instantly claimed." Rather, Applicants argued that the fact that Exxon Corporation did not disclose that its elastomer composition can be used in electric cables, when it has done so in similar applications, is probative evidence of the level of ordinary skill in the art. Applicants submit that it is Exxon, and persons of ordinary skill in the art, who would not have thought the elastomers to be suitable. Only Applicants discovered the converse to be true.

Indeed, the M.P.E.P. explains that the prior art itself can be used to show the level of skill in the art for determining obviousness. M.P.E.P. § 2143.03. Thus, the fact that those skilled in the art, possibly highly skilled in the art, did not think that the disclosed elastomer composition would have been useful in electric cables is certainly evidence of what would have been obvious to one of ordinary skill in the art at the time of the invention.

Moreover, this fact further emphasizes that the Examiner's analysis is purely driven by hindsight. In rebuttal, the Examiner contends that "so long as [the examiner's conclusion of obviousness] takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper." *Office Action*, pages 3-4. While Applicants certainly agree with this basic premise, Applicants find fault with the Examiner's application of it to the present facts.

In this case, the Examiner did not only take into account the knowledge of the skilled artisan because, as discussed above, others did not find the disclosed elastomer composition to be suitable for electric cables. But the Examiner ignores this fact and relies on the present specification as a roadmap to construct the claimed invention. This, however, is in clear contravention of the standards set forth by the M.P.E.P. M.P.E.P. § 2143 (basic requirements of a prima facie case of obviousness).

On this point, Applicants would like to bring to the Examiner's attention a Communication under Rule 51(4), *i.e.*, a Notice of Allowance recently issued by the European Patent Office for the corresponding European Patent Application. The EPO had only considered Applicants compositions claims invalidated by WO '288 and allowed the cable claims over that reference. Applicants provide herewith a courtesy copy of the 9/29/00 International Search Report, 9/18/03 EPO Communication (rejection), 11/14/03 Response to Communication, and 3/22/04 Notice of EPO Allowance.

Accordingly, for at least this reason, the rejection is improper.

2. Improved Mechanical Strength Alone Would Not Have Suggested to One of Ordinary Skill in the Art to Combine the Cited References

The mere fact that WO '288 discloses that its elastomer composition provides improved mechanical properties such as compression set resistance would not have suggested to one of ordinary skill in the art to combine WO '288 with the "admitted prior art." The Examiner has offered no evidence that a person of ordinary skill in the art would recognize the recited properties as relevant to an electrical cable. Without such evidence, the so-called advantages are meaningless.

To the extent that WO '288 does disclose "superior" mechanical properties, it discloses them for its disclosed elastomer composition alone (which does not include the use of the elastomer in a cable comprising at least one conductor). It is notable that every example disclosed in WO '288 relates to fabricated polymeric articles and does not mention electrically conductive and semiconductive products.

Moreover, when making its pronouncements regarding advantages of its elastomers, WO '288 is not referring to all prior art elastomers. Rather it expressly limited its pronouncement, comparing its elastomers against elastomers that utilize dienes other than vinyl norbornene. Abstract. Accordingly, Applicants submit that WO '288 only establishes improved properties against elastomers that comprise 40-90 mole% ethylene, 10-60 mole% alpha-olefin, and 0.2-5 mole% diene (other than vinyl norbornene). *Id.* at page 7. Thus, the Examiner's proposed motivation only applies where the primary reference teaches 40-90 mole% ethylene, 10-60 mole% alpha-olefin, and 0.2-5 mole% diene (other than vinyl norbornene) and Applicants have not seen any evidence of record that the "admitted prior art" establishes this.

Thus, this disclosure, even when viewed in conjunction with the prior art, does not suggest to a person of ordinary skill in the art that these improved mechanical properties of a composition carry over to a product comprising the composition.

3. The Prior Art Did Not Recognize the Nature of the Problem the Present Inventors Solved

It is well understood that a motivation to combine can be established by evidence of the nature of the problem to be solved. M.P.E.P. § 2143.01. In this case, however, the prior art cited by the Examiner fails to recognize or appreciate the technical problem.

For example, as explained in the present specification, the present inventors sought to devise “an electric cable with a covering consisting of a polymer material possessing mechanical and electrical properties adequate for the usual utilization conditions, while maintaining high electrical strength even in the presence of moisture, without using potentially polluting products” *Specification*, page 4, lines 21-32. The present inventors solved this problem by using as the base material for the “at least one insulating layer” the presently claimed elastomer composition.

As discussed at length in the specification, the “admitted prior art” taught electric cables comprising polluting products, such as lead. *Id.* at page 2, line 9 - page 4, line 20. The very material the present inventors sought to remove from its claimed invention, due to pollution problems. And, further, *WO '288*, did not recognize that its composition could be used successfully as a base material in an insulating layer of an electric cable; thus, avoiding the need of lead. Indeed, *WO '288* does not mention or discuss its elastomers' electrical properties at all. It is evident, then, that even when the “admitted prior art” is viewed in conjunction with *WO '288*, nothing explicitly or implicitly suggests the solution to the technical problem the present inventors ultimately solved. Thus, in view of this failing, the cited prior art would not have rendered the claimed inventions obvious.

4. There is No Evidence For a Reasonable Expectation of Success

The Examiner has provided no basis for concluding that the proposed application of *WO '288*'s elastomers in the “admitted prior art” compositions would yield a successful product. First, as previously noted and acknowledged by the Examiner, *WO '288* does not teach or suggest that its polymers are suitable for electrical cables. When

the assignee of WO '288, Exxon Corp., believed its polymers suitable for electrical cables, it explicitly stated so. See, e.g., WO '523 at page 1. Second, the proposed motivation to combine has no bearing on success as an electrical cable.

Thus, there is nothing in the "admitted prior art" or in the cited prior art that suggests that the proposed combination would be successful. Until Applicants' discovery, those skilled in the art (such as Exxon) did not recognize the suitability of such elastomers.

Thus, the record lacks evidence that one would have combined the cited references in the manner suggested by the Examiner. Accordingly, Applicants respectfully submit that the Examiner withdraw this improper rejection.

B. Rejection Over the "Admitted Prior Art" in View of WO '288 and Further in View of EP '802

The Examiner has also maintained the rejection over claim 32 under 35 U.S.C. §103(a) as unpatentable over the alleged admitted prior art in view of WO '288 and further in view of EP 0 893 802 A1 ("EP '802"), for the reasons disclosed at page 3 of the Final Office Action. Applicants respectfully traverse this rejection for at least the reasons set forth below.

The Examiner admits that both the admitted prior art and WO '288 do not teach the use of "at least one layer including the polymer composition and a conductive filler to provide semiconductive properties." Final Office Action, page 2. Thus, the Examiner relies on EP '802 which allegedly provides this teaching. The Examiner concludes that it would have been obvious to combine these teachings as the use of conductive fillers is "typical and well-known in the art as taught by EP '802."

However, as discussed above, one of ordinary skill in the art would not have been motivated to combine the teachings of the admitted prior art and the WO '288. Thus, EP '802, as relied on by the Examiner for its teachings of conductive fillers, does not cure the fundamental deficiencies of the underlying references and thus cannot render the claimed invention obvious. Accordingly, Applicants respectfully request that the Examiner also withdraw this improper rejection.

III. Conclusion

In view of the foregoing remarks, Applicants respectfully request the reconsideration and reexamination of this application and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.

Dated: June 14, 2004

By: Mareesa A. Frederick
Mareesa A. Frederick
Reg. No. 55,190

Attachments: 9/29/00 International Search Report

9/18/03 EPO Communication (rejection)

11/14/03 Response to Communication

3/22/04 Notice of EPO Allowance

INTERNATIONAL SEARCH REPORT

National Application No

PCT/EP 00/05446

A. CLASSIFICATION OF SUBJECT MATTER
 IPC 7 H01B3/44 C08L23/16

According to International Patent Classification (IPC) or to both national classification and IPC

B. FIELDS SEARCHED

Minimum documentation searched (classification system followed by classification symbols)

IPC 7 H01B C08L

Documentation searched other than minimum documentation to the extent that such documents are included in the fields searched

Electronic data base consulted during the international search (name of data base and, where practical, search terms used)

EPO-Internal, WPI Data, PAJ

C. DOCUMENTS CONSIDERED TO BE RELEVANT

Category *	Citation of document, with indication, where appropriate, of the relevant passages	Relevant to claim No.
X	WO 97 00288 A (EXXON CHEMICAL PATENTS INC ;ADVANCED ELASTOMER SYSTEMS (US)) 3 January 1997 (1997-01-03) page 3, line 10 -page 4, line 4 page 7, line 14 - line 32 page 9, line 8 - line 10 page 10, line 21 - line 29 page 12, line 1 -page 13, line 2 examples 3,4,7-10,12-14,19-31 ---	12-15, 17,19-21
Y	WO 98 56012 A (EXXON CHEMICAL PATENTS INC) 10 December 1998 (1998-12-10) cited in the application the whole document --- -/-	1-10



Further documents are listed in the continuation of box C.



Patent family members are listed in annex.

* Special categories of cited documents :

"A" document defining the general state of the art which is not considered to be of particular relevance

"E" earlier document but published on or after the international filing date

"L" document which may throw doubts on priority claim(s) or which is cited to establish the publication date of another citation or other special reason (as specified)

"O" document referring to an oral disclosure, use, exhibition or other means

"P" document published prior to the international filing date but later than the priority date claimed

"T" later document published after the international filing date or priority date and not in conflict with the application but cited to understand the principle or theory underlying the invention

"X" document of particular relevance; the claimed invention cannot be considered novel or cannot be considered to involve an inventive step when the document is taken alone

"Y" document of particular relevance; the claimed invention cannot be considered to involve an inventive step when the document is combined with one or more other such documents, such combination being obvious to a person skilled in the art.

"&" document member of the same patent family

Date of the actual completion of the international search

22 September 2000

Date of mailing of the international search report

29/09/2000

Name and mailing address of the ISA

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Authorized officer

Puetz, C

INTERNATIONAL SEARCH REPORT

International Application No
PCT/EP 00/05446

C.(Continuation) DOCUMENTS CONSIDERED TO BE RELEVANT		
Category *	Citation of document, with indication, where appropriate, of the relevant passages	Relevant to claim No.
Y	US 5 274 013 A (LIEUX RALPH L) 28 December 1993 (1993-12-28) cited in the application the whole document ---	1-10
Y	WO 97 00523 A (EXXON CHEMICAL PATENTS INC) 3 January 1997 (1997-01-03) cited in the application the whole document ---	1-4
A	EP 0 893 802 A (PIRELLI CAVI E SISTEMI SPA) 27 January 1999 (1999-01-27) page 2, line 55 -page 3, line 9 page 3, line 40 - line 46 page 5, line 33 - line 38 figure 1; examples ---	1,8-11
A	DATABASE WPI Section Ch, Week 199734 Derwent Publications Ltd., London, GB; Class A12, AN 1997-369616 XP002123372 & JP 09 157465 A (FURUKAWA ELECTRIC CO LTD), 17 June 1997 (1997-06-17) abstract -----	1,12, 19-21

INTERNATIONAL SEARCH REPORT

Information on patent family members

International Application No

PCT/EP 00/05446

Patent document cited in search report		Publication date	Patent family member(s)	Publication date
WO 9700288	A	03-01-1997	US 5656693 A	12-08-1997
			AU 716677 B	02-03-2000
			AU 6109596 A	15-01-1997
			BR 9608988 A	29-06-1999
			CA 2220668 A	03-01-1997
			CN 1190420 A	12-08-1998
			DE 69603737 D	16-09-1999
			DE 69603737 T	16-03-2000
			EP 0843698 A	27-05-1998
			ES 2135904 T	01-11-1999
			JP 11507696 T	06-07-1999
WO 9856012	A	10-12-1998	US 5952427 A	14-09-1999
			AU 5692198 A	21-12-1998
			CN 1254438 A	24-05-2000
			EP 0988635 A	29-03-2000
US 5274013	A	28-12-1993	AU 4227993 A	30-12-1993
			CA 2114552 A	09-12-1993
			DE 69317730 D	07-05-1998
			DE 69317730 T	30-07-1998
			EP 0597061 A	18-05-1994
			ES 2114050 T	16-05-1998
			JP 6509680 T	27-10-1994
			WO 9324940 A	09-12-1993
WO 9700523	A	03-01-1997	US 5674613 A	07-10-1997
			EP 0843878 A	27-05-1998
EP 0893802	A	27-01-1999	IT MI971739 A	25-01-1999
			AU 7730398 A	04-02-1999
			AU 8631398 A	16-02-1999
			BR 9802552 A	21-12-1999
			WO 9905688 A	04-02-1999
			EP 0998747 A	10-05-2000
			JP 11120825 A	30-04-1999
			NZ 330985 A	28-05-1999
JP 9157465	A	17-06-1997	NONE	



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Application No. 00 943 802.9 - 2124	Ref. G68465 VM/gf	Date 18.09.2003
Applicant PIRELLI S.p.A.		

Communication pursuant to Article 96(2) EPC

The examination of the above-identified application has revealed that it does not meet the requirements of the European Patent Convention for the reasons enclosed herewith. If the deficiencies indicated are not rectified the application may be refused pursuant to Article 97(1) EPC.

You are invited to file your observations and insofar as the deficiencies are such as to be rectifiable, to correct the indicated deficiencies within a period

of 4 months

from the notification of this communication, this period being computed in accordance with Rules 78(2) and 83(2) and (4) EPC.

One set of amendments to the description, claims and drawings is to be filed within the said period on separate sheets (Rule 36(1) EPC).

Failure to comply with this invitation in due time will result in the application being deemed to be withdrawn (Article 96(3) EPC).



GORDON M C
Primary Examiner
for the Examining Division

Enclosure(s): 1 page/s reasons (Form 2906)

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Our ref.: G68465/VM
Milan, 13 November 2003

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14. Nov. 2003

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FAX N. ++49-89-23994465

**RE: European patent application No.00943802.9, filed
14.06.2000, in the name of PIRELLI & C. S.p.A.**

Dear Sirs,

Reference is made to the above identified application and to the Communication pursuant to Article 96(2) EPC dated September 18, 2003.

As the Examiner himself recalls in said communication, an international preliminary examination report (IPER) has already been drawn up for the present application in accordance with the PCT. Of course, the IPER had been anticipated by a Written Opinion to which the applicant replied submitting some arguments.

As the Examiner rightly noted, the international application had been amended and yet the present specification was filed in the unabridged form.

The amendments effected during the international phase are hereby confirmed and the relevant replacing sheets are herewith attached whereas some arguments, substantially similar to the ones already submitted during the previous phase are herebelow illustrated.

Claims 12-21 are deleted.

Claims 1-11 should be deemed as novel and inventive considering that the expression "substantially lead-free" in claim 1 has to be considered as a functional characteristic according to the principles elaborated by the Technical Boards of Appeal of the EPO, f.i. in T500/89.

In fact, "substantially lead-free" constitutes one of the technical features of the cable described by the invention - a criterion, in effect - forming an essential element of the teaching of the invention.

WO 97/00523 does neither teach nor give a hint throughout the specification in order to avoid the use of lead in the disclosed electrical device. In other words, it does not disclose "directly and unambiguously" an electrical

device wherein at least one insulating layer comprises a substantially lead-free polymer composition according to the present invention.

Indeed, WO 97/00523 discloses an electrical device showing electrical compound formulations always comprising lead compounds in remarkable amounts (10 phr, see Table 2, page 20) since it was well known in the art that to prevent the decay of dielectric strength in time and in the presence of water, lead compounds had to be added to the polymer formulations (see the present specification, page 2, lines 1-8 and page 4, lines 21-29).

As it has been re-affirmed several times by the Boards of the EPO (see also the Guidelines for Examination in the EPO, C IV, 7.3), in determining novelty, a prior art document should be read as it would have been read by a person skilled in the art, who, evidently, in the present case, could not learn directly and unambiguously from WO 97/00523 that lead could not be used in the disclosed polymer formulations, although the problem was long felt in the field (see f.i. the present specification, page 2, line 9 to page 3, line 9).

Once the novelty of claim 1 is recognised, in view of the "substantially lead-free" feature according to the above arguments, the same should be done for claims 2-10, since they all depend on claim 1.

As to the objection concerning the inventive step of the present invention, there is noted that according to the "problem-solution" approach, WO 97/00523 does not appear to be the closest prior art to the invention.

In fact, by reading the '523 specification, the skilled man learns that the technical problem faced therein stands in indicating an "elastomeric polymer insulating material for electrical devices that can be extruded relatively rapidly, in the substantial absence of surface roughness, having a relatively rapid cure rate, relatively high cure state and relatively low electrical loss..." as well as an "improved long term heat aging and lower cure additives consumption, all of which may reduce the overall manufacturing cost of the cable insulation and/or improve quality" (see '523, page 3, lines 7-12).

Adversely, the present invention is to be considered as an effort to produce an electric cable with a covering consisting of a polymer material.. "capable of maintaining high electrical strength even in the presence of moisture, without using potentially polluting products which can present a problem when the cable has to be disposed of at the end of its life (see the present description, f.i. page 4, lines 21-29). Since the technical problem with which the invention deals is plainly different from the one faced by '523, the skilled man would have not even taken the latter document into consideration to solve the long felt problem pointed out in the present specification.

Regardless of the different technical problem, WO '523 discloses - nevertheless- some tests (see page 18, lines 3-9 and page 26, Table 9) evaluating wet electrical properties of some of the formulations "suitable" for the device of the invention; the superior electrical properties of such formulations, after ageing in water, are ascribed to the absence of calcium residues; yet, any tested formulation contains lead compounds, therefore confirming that the skilled man knew very well that the use of lead would have prevented the decay of electrical properties in time and in the presence of

water, as above already recalled. Accordingly, the skilled man would have had no hints, from WO '523, as to how to obtain enhanced electrical properties without any lead comprised in the insulating layer of the electrical device.

A further evidence of the correctness of the above arguments can be found in observing the absence throughout the specification of the '523, not only in the examples, of any pointer which would have suggested to the skilled man that the prior art formulations, yet "substantially lead-free", would have been able to solve a technical problem completely different from the one dealt with by '523.

To state that the skilled man would have indeed solved the technical problem dealt with by the invention on the basis of the '523 disclosure would seem to be an *ex post facto* analysis, which should be however avoided when evaluating the inventive step.

In view of the foregoing, claims 1-11 are deemed to be both novel and inventive according to articles 52(1), 54(1)-(2) and 56 EPC.

Herewith enclosed in triplicate are replacement sheets of pages 6, 7, 24 reflecting the deletion of the composition from the scope of the application.

Claims 12-21 (and page 25) are deleted.

Also the abstract page (original page 26) is herein attached in triplicate as a replacement sheet, having been re-numbered due to the complete deletion of page 25.

As it has already been stated above, claims 1-11 remain unchanged, whereas claims 12-21 are cancelled.

With best regards,

Vincenzo Mancini
Vincenzo Mancini
(representative)

Encl.: replacement sheets: (pages 6,7,24,25) 3x



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Application No. 00 943 802.9 - 2124	Ref. G68465 VM/gf	Date 22.03.2004
Applicant Pirelli & C. S.p.A.		

Communication under Rule 51(4) EPC

You are informed that the Examining Division intends to grant a European patent on the basis of the above application with the text and drawings as indicated below:

In the text for the Contracting States:

AT BE CH CY DE DK ES FI FR GB GR IE IT LI LU MC NL PT SE

Description, Pages

1-5, 8-22 as published

6, 7 received on 14.11.2003 with letter of 13.11.2003

Claims, Numbers

1-11 as published

Drawings, Sheets

1/2-2/2 as published

A copy of relevant documents is enclosed

The title of the invention in the three official languages of the European Patent Office, the international patent classification, the designated Contracting States, the registered name of the applicant and the bibliographic data are shown on the attached EPO Form 2056.

You are requested **within four months** of this notification